

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 5TH DECEMBER 2006 / 14TH AGRAHAYANA 1928

CRL.A.No. 1011 of 2002()

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SC.724/1999 of ADDL.SESIONS COURT (ADHOC) II, KASARAGOD  
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APPELLANT: ACCUSED  
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MARSHAL FERNANDEZ,  
S/O.THOMAS FERNANDEZ D'SOUZA,  
AMBITHADI, KUNJATHUR, KASARAGOD DISTRICT.

BY ADV. SRI.A.P.CHANDRASEKHARAN (SR.)  
SMT.PRABHA R.MENON  
SRI.PUSHPARAJAN KODOTH  
SRI.M.KRISHNAKUMAR  
SRI.K.JAYESH MOHANKUMAR

RESPONDENT: COMPLAINANT  
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STATE OF KERALA, REPRESENTED BY THE  
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,  
ERNAKULAM.

BY PUBLIC PROSECUTOR C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD  
ON 5-12-2006 , THE COURT ON 05/12/2006 DELIVERED THE  
FOLLOWING:

**K. Thankappan, J.**

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**Crl.A. No. 1011 of 2002**  
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**Dated this the 5<sup>th</sup> day of December, 2006**

**JUDGMENT**

The appellant was charge-sheeted for the offence punishable under section 55(a) of the Abkari Act on the allegation that he was found in possession of 125 packets, each containing 100 ml. of Karnataka made arrack at Vayalinkara in Kunjathur Village. To prove the charge against the appellant, the prosecution examined PW1 to PW5 and Exts.P1 to P7 were marked. MOI (series and MOII (series) were also marked. PW1 to PW3 are police officials. PW4 and PW5 are the witnesses who attested Ext.P1 seizure mahazar. Though they turned hostile to the prosecution, they admitted their signatures in Ext.P1. When the appellant was questioned under section 313 of the Cr. P.C., he denied the commission of offence alleged against him. He stated that he had been falsely implicated by the police.

2. Relying on the evidence adduced by the prosecution both, oral and documentary, the trial court found the appellant guilty under section 55 (a) of the the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for three years and a fine of Rs.1,00,000/- with default sentence of a rigorous imprisonment for a period of six

months. The above conviction and sentence are under challenge in this appeal.

3. The learned counsel for the appellant submits that the even if the prosecution evidence is accepted as such, as per the decisions reported in Purushan V. State of Kerala (2002(2) KLT 661, Surendran V.State of Kerala (2004(1) KLT 404 and Sudhepan @ Aniyam V. State of Kerala (2005 (2) KLT (Cri) 631) the conviction entered against the appellant under section 55(a) is not legally sustainable. The argument is on the ground that the case against the appellant as per the charge is that he was found in possession of 125 packets, each containing 100 ml. Of Karnataka made arrack at Vayalinkara in Kunjathur Village. On questioning it is revealed that the same was brought for sale. None of the officers who have given evidence before the court stated that the appellant had transported, exported or imported the contraband the article. In Purushan's Case (Supra) this Court held that the possession therein was not directly involved in the process of import, export or transport. This Court also held that **“it is such possession that is made liable to a lesser punishment under S.58”**. The above question was also considered by a Division Bench of this Court in Surendran's case (Supra) and held that “the case shall fall within the ambit of S.55(a) only when a person is found in possession of liquor in the course of import, export, transport or transit of the goods”. It is also held that in

case the possession was merely with the knowledge of the goods having been illegally imported or manufactured, the case would fall within the mischief of section 58 of the the Abkari Act. In Sudhepan's case (Supra) this Court also held that **“Under section 55(a) of the Abkari Act, the prosecution must allege and prove that such possession was incidental or in connection with export, import, transport or transit of liquor”**. The evidence of PW1 to PW3 would show that when PW1 to PW3 reached the eastern side of Bhagavathi Tmple at Vayalinkara at 6 P.M., they saw the accused with a plastic bag in his hand, having 125 packets, each containing 100 ml Karnataka made arrack in it. In applying the principles laid down in the above decisions, this Court is of the view that the case against the appellant would fall within section 58 of the the Abkari Act.

4. In the circumstances, the conviction entered against the appellant under section 55(a) of the Abkari Act and the sentence awarded thereunder are set aside. Hence, the appellant is convicted under section 58 of the Abkari Act.

5. The learned counsel for the appellant submits that there is no evidence adduced by the prosecution to prove that the appellant is a habitual offender and hence a lenient view may be taken against the appellant while imposing the sentence.

6. Considering the facts and circumstances of the case and the fact that the incident is of the year 1999, this Court is of the view that fine of Rs.3,000/- with default sentence of three months simple imprisonment of the appellant will meet the ends of justice. Hence, the appellant is sentenced to pay a fine of Rs.3,000/- and in default to undergo simple imprisonment for three months.

The appeal is partly allowed.

**K.Thankappan,  
Judge.**

**mn.**

**K. Thankappan,J.**

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**Crl.A.No. 1011/2002**  
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**Judgment**

**14-11-2006**